

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

3 **MIIC'S & PARTNERS AMERICA : CIVIL ACTION**

4 **INC., et al., :**

Plaintiffs, :

 :

5 **vs. :**

 :

6 **TOSHIBA CORPORATION, et :**

al., :

7 **Defendants, :**

 :

8 **-and- :**

 :

9 **SAMSUNG DISPLAY CO., LTD., :**

Intervenor. :

10 **----- NO. 14-803-RGA**

11 **MIIC'S & PARTNERS AMERICA :**

12 **INC., et al., :**

Plaintiffs, :

 :

13 **vs. :**

 :

14 **FUNAI ELECTRIC CO. LTD, et :**

al., :

Defendants. :

 :

15 **-and- :**

 :

16 **SAMSUNG DISPLAY CO., LTD., :**

Intervenor. :

 :

18 **NO. 14-804-RGA**

20 **Wilmington, Delaware**

21 **Wednesday, January 4, 2017**

1:37 o'clock, p.m.

22 **- - -**

23 **BEFORE: HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.**

24 **Valerie J. Gunning**
 Official Court Reporter

1 APPEARANCES:

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1 APPEARANCES (Continued) :

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6 Samsung Display Co., Ltd.

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15 Funai Electric Co., Ltd.,
Funai Corporation, Inc. and P&F USA
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P R O C E E D I N G S

THE COURT: All right. Good afternoon. Please

8 So this is MiiCs & Partners versus Toshiba,
9 No. 14-803, and MiiCs and partners versus Funai, No. 14-804.
10 Is that right?

11 || MR. BUTLER: That is correct.

12 THE COURT: By the way, the defendant that I
13 call Funai, is that how you actually pronounce it?

14 MR. ROZENDAAL: Funai is how you pronounce it.
15 Yes, sir.

16 THE COURT: Okay. All right. So, Mr. Butler,
17 you have somebody different with you this afternoon.

18 MR. BUTLER: I do. I have Mr. Wasserman with me
19 this afternoon.

THE COURT: All right. Have we met before?

MR. WASSERMAN: We have your Honor.

22 THE COURT: All right. Well good to see you
23 .

24 MR. WASSELMAN: Thank you.

THE COURTS. — See Me. Knobell, there. — See

1 Mr. Schladweiler. And --

2 MR. ROZENDAAL: Rozendaal here.

3 THE COURT: I was thinking you looked like
4 somebody else. Well, in any event, so, Ms. Kraman, who do
5 you have with you?

6 MS. KRAMAN: David Garr for Samsung.

7 MR. GARR: Good afternoon.

8 THE COURT: Garr?

9 MR. GARR: Yes.

10 THE COURT: And Mr. Schladweiler?

11 MR. SCHLADWEILER: I have J. C. Rozendaal.

12 THE COURT: I've certainly seen him before.

13 And, Mr. Mallard, you have with you
14 Mr. Meiklejohn, who I know I have seen before.

15 MR. MEIKLEJOHN: Yes.

16 THE COURT: This morning.

17 Okay. So I read the little. And I guess I have
18 some thoughts, but one thing I was curious about was
19 defendants who went second said the plaintiffs' answer to an
20 interrogatory was insufficient, which is a bit odd
21 procedurally because the plaintiffs' letter didn't mention
22 it and the defendants didn't file something that would give
23 the plaintiffs an opportunity to respond.

24 Do you have something to say about that?

25 MR. BUTLER: Well, the issue really is the

1 limitation of references. We've agreed that we would
2 provide an answer to the interrogatory once we have the
3 limitation put in place.

4 THE COURT: Okay. So you in your opening letter
5 said, and I forget what the number was, I think you said 66
6 references, and in any event, the defendants have now said,
7 no, no, no. No more than 36 references.

8 Do you have any comment on that?

9 MR. BUTLER: So you're right, your Honor. I
10 don't think we're all that far apart. The real issue here
11 is, are we going to go with 20 references, which plaintiffs
12 had proposed total over the two cases or 36 references,
13 which defendants and intervenors have proposed over the two
14 cases.

15 THE COURT: So one of the questions I was
16 wondering about, because if I -- and so it's worth stating.
17 As probably most of you know, I do look to the Federal
18 Circuit Bar Association or Federal Circuit Model Order,
19 which I understand was withdrawn and had no authority, but
20 nevertheless, it seems to me a reasonable thing to look at
21 because it was the product of a lot of people's thought who
22 presumably had some expertise in the area, so I often use
23 that as a kind of starting point as to what is reasonable.
24 But, on the other hand, one of the things that the parties
25 all seem to be agreeing on, or I'm wondering if the parties

1 do agree on, is they're treating it like this is one case as
2 opposed to two cases.

3 And I'm just wondering, since the defendants all
4 have different lawyers, and since the cases are presumably
5 going to be tried separately, whether the -- well, does
6 anybody have any comment on this?

7 MR. GARR: I will comment on that from the
8 defendants' side.

9 THE COURT: Okay.

10 MR. GARR: It is true that there are two cases
11 here and three parties with Samsung Display who I represent
12 as well as Toshiba and Funai, but we have used the idea
13 behind the model order as a starting point, and we realize
14 that given the fact that we have for the most part the same
15 patents across the two cases presenting --

16 THE COURT: I mean the five that are --

17 MR. GARR: There are five in one and six in the
18 other.

19 THE COURT: But the one that has six, that's the
20 same five plus one. Right?

21 MR. GARR: That's right. So across the two
22 cases, we have six patents, total, and we are working
23 together as a defense group to try to streamline things, and
24 can agree that we're all going to go with the same six
25 references for per patent. That's the way we've looked at

1 it. We have six different patents. And while they all sort
2 of relate somehow to LCD technologies, none of the patents
3 happen to be related.

4 THE COURT: Well, I saw that you said in the
5 letter, I think your word was "disparate," which is a nice
6 word.

7 Do the plaintiffs disagree with that
8 characterization of the patents?

9 MR. BUTLER: They are not in the same family.
10 They are all directed to LCD technology essentially.

11 THE COURT: But not being --

12 MR. BUTLER: There's production.

13 THE COURT: Well, I guess what I'm wondering,
14 perhaps a different way to say this, you know, sometimes
15 you have a case and there are three patents and they're all
16 the same family and one reference deals with 90 percent of
17 each of them. I mean, the references that the defendants
18 assert, do they assert any of the same references for any of
19 these patents or is it each patent has its own set of
20 references?

21 MR. BUTLER: I will let the defendants answer
22 that one.

23 MR. GARR: That's the challenge that we're
24 confronted with here. They're all different. There may be
25 one or two references across the whole patents where a

1 reference may be applicable to two, but when we say
2 disparate, they're all LCD patents. One relates to the back
3 light. Another relates to the frame. Another relates to
4 the method of making the transistor. Another relates to the
5 optics and the sort of preventing, improving the view angle
6 characteristic. So it's not like we have references that
7 are applicable to many patents.

8 THE COURT: But just to interrupt, what you said
9 at the beginning is essentially, if I had your invalidity
10 contentions, the references cited for, you know, patent one,
11 leaving aside possibly one reference, there are going to be
12 a different set of references than patent two, which is
13 going to be a different set of references than patent three,
14 et cetera?

15 MR. GARR: That's right, and that's why the
16 model order, 20 reference limit, we don't think makes a lot
17 of sense here.

18 THE COURT: Okay. Three references per patent,
19 which is essentially what 20 is, seems kind of skimpy if the
20 patents are all addressing some different technology, even
21 if it's all the general LCD ballpark.

22 So this is what I'm inclined to do. In fact,
23 I'm pretty sure this is what I'm going to do, but let me
24 just put it out there and I will hear from you if you or
25 anybody wants to speak.

1 But what I'm inclined to do is to say the 36
2 reference reduction -- what I imagine is, because I got from
3 the letters that it didn't seem like the defendants were
4 saying you had to answer the interrogatory before they went
5 to 36. So what I am imagining is, they go to 36. You
6 answer the interrogatory. Depending on what you say in the
7 interrogatory, maybe further reduction is possible, but it
8 seems hard to know -- hard for me to say that before you lay
9 your cards on the table as to what's wrong with all of these
10 references that they have, is to say that I ought to be
11 chopping it down some more.

12 So that's what I'm inclined to do, is to say
13 they go to 36, you answer the interrogatory, and then after
14 you answer the interrogatory, if you've actually given a
15 fulsome answer, and I don't mean that in any personal way,
16 but, you know, a lot of times -- well, the first attempt
17 said nothing, so, you know, you're starting from a low
18 point. But if you give an answer that really does help
19 narrow the issues, then you might by agreement or even by
20 talking to me if you don't have an agreement, we could
21 narrow it some more, but I don't think it should be narrowed
22 any more right now without knowing what your problems are
23 with the art that they're going to assert.

24 MR. BUTLER: And I can see absolutely your point
25 in a typical case, but the difference here is all six of

1 these patents have already been through an inter partes
2 review in front of the Patent Trial and Appeal Board with
3 the same two defendants, the same intervenor. You would
4 think that in that procedure, they certainly put their best
5 foot forward.

6 THE COURT: Well, wait a second, Mr. Butler.
7 I'm correct in thinking -- I can't remember now. The reason
8 why we have these patents is these are the ones where the
9 IPRs were denied. They weren't instituted. Right?

10 MR. BUTLER: That's correct.

11 THE COURT: So my general view is that
12 non-institution is just awash. I mean, it's certainly
13 legally just awash, but I think practically, it's just a
14 wash, but maybe that's not the point you're making.

15 MR. BUTLER: So the references were presented to
16 the board. There was a briefing scheduled. We laid our
17 cards out on the table. Defendants and intervenor laid
18 their cards out on the table with respect to invalidity.
19 The board decided, we don't think that this should be
20 instituted and reviewed any longer. We don't think there's
21 a substantial likelihood of success that the defendants and
22 intervenor will succeed with the references that they
23 presented to us, so, no thanks. We don't even want to
24 entertain this.

25 THE COURT: And the point of this is?

1 MR. BUTLER: That defendants have had their
2 opportunity already with a bunch of references at the Patent
3 Office on invalidity. We've laid our validity positions out
4 on the table on all six of these patents already, so this
5 isn't a typical case where you have not been through an IPR
6 proceeding, defendants have no idea what our validity
7 positions might be.

8 THE COURT: Well, but so one of the things is,
9 whatever it is you said in the IPR proceedings, not exactly
10 binding on you in a way that answering it in this
11 interrogatory would be binding on you. Right?

12 MR. BUTLER: Well, I'm sure it's all public
13 record. It's all part of the essential file history of the
14 case.

15 THE COURT: Right. But the thing is, you know,
16 you make arguments which, of course, because in the end they
17 didn't resolve anything, they just know what the arguments
18 you made then were. Maybe you'll make the exact same
19 arguments. They were winning arguments, so to speak, so
20 maybe you'll make the same arguments now, but they, you
21 know, to speak less like a judge, you need to be locked in.
22 Right?

23 MR. BUTLER: And maybe the defendants will
24 present the exact same combinations of references, but I
25 doubt it, because the Patent Trial and Appeal Board already

1 looked at the combinations and said, no thanks.

2 THE COURT: But because it has no precedential
3 effect -- I mean, they can present the exact same things.

4 Right?

5 MR. BUTLER: Absolutely. Absolutely.

6 THE COURT: I mean, maybe they will, maybe they
7 won't.

8 MR. BUTLER: Right.

9 THE COURT: But in any event, you're going to
10 get the 36. You can then lock in as to what your problems
11 with the 36 are and, you know, again, I mean, clearly,
12 they're never going to be actually presenting 36, but before
13 they start going down from 36, they need to know what your
14 arguments -- what you committed to your arguments being.

15 Right?

16 MR. BUTLER: Absolutely. I would be surprised
17 if they're a lot different than what --

18 THE COURT: All right. Well, that's a different
19 thing. Yes, maybe they will be, in which case I'm sure
20 you'll be able to answer the interrogatory without too much
21 time passing.

22 So when are you going to reduce to 36?

23 MR. GARR: We can do that. I think we just need
24 to -- once we know the number, make sure we get client
25 authority. Certainly the next day or two.

1 THE COURT: All right.

2 MR. GARR: This week. By the end of the week.

3 THE COURT: Okay. So you'll reduce the 36 by,
4 let's just say, Friday, frankly, because I'm correct in
5 thinking when you say the client, I take it Samsung is in
6 Korea. Toshiba is in Japan. And I guess Funai is Japan,
7 too?

8 MR. ROZENDAAL: Yes, sir.

9 MR. GARR: We all do late night conference calls
10 on this side of the table.

11 THE COURT: Okay. So, in any event, you know,
12 today is Wednesday. Why don't you see if you can't reduce
13 on Friday the 36, or by close of business on Friday.

14 When do you want to answer the interrogatory
15 by?

16 MR. BUTLER: Two weeks sounds reasonable to me.

17 THE COURT: All right. So that's -- let me see.

18 MR. BUTLER: The 20th.

19 THE COURT: All right. Thank you. The 20th you
20 can answer the interrogatory, and you all can confer after
21 that.

22 I take it because you also said in there you're
23 planning on going from 20 to 18 or maybe from 18 to 16 on --
24 wait a second. Yes. I guess from 18 to 16 on Funai in
25 terms of asserting claims.

1 MR. BUTLER: We could do that.

2 THE COURT: Well, so --

3 MR. BUTLER: If we are going with 36, then the
4 inclination is not to now reduce, but if that's your Honor's
5 position.

6 THE COURT: I think you ought to get down to 16,
7 which, you know, why don't you just do that at the same time
8 as you are answering the interrogatories, because that will
9 give you the maximum chance to -- those two decisions are
10 related, I think.

11 MR. BUTLER: Okay.

12 THE COURT: And depending on what's -- you know,
13 when there's a responsive interrogatory, I'm not going to
14 order you to meet and confer, but I would encourage you to
15 discuss it as to whether some further reduction is possible
16 and say that I will open the hearing from, I guess, the
17 plaintiff, if it turns out that they think the combination
18 of their interrogatory answer -- well, and if they think you
19 really should be reducing it further from the 36. I just
20 don't know. Okay?

21 MR. BUTLER: Can do.

22 MR. GARR: That seems right.

23 The one other thing I would raise though is that
24 we have two weeks from Friday takes us to January 20th.

25 THE COURT: Okay.

1 MR. GARR: And that happens to be under the
2 current schedule the deadline for our opening expert reports
3 on which we will be going forward on invalidity.

4 THE COURT: All right. I think you probably
5 should postpone that a little bit.

6 MR. GARR: I think we may need to talk about
7 that.

8 MR. FOWLER: We may need to talk about that.

9 THE COURT: Is there anything else you want to
10 talk about today?

11 MR. GARR: No.

12 MR. ROZENDAAL: Your Honor, there's one thing
13 that came out of this morning's meeting that you had with
14 the Toshiba defendants. I understand that there's going to
15 be early summary judgment briefing on a license issue. We
16 have a similar issue in the Funai case, where we think more
17 than half of the sales are covered by a license. We talked
18 with the other side whether it makes sense to do an early
19 motion on that. We have not yet heard their response. But
20 I wanted to sort of see if your Honor thought it might make
21 sense to do those on a parallel track since they present
22 similar issues.

23 THE COURT: I think the answer is fairly obvious
24 what I would think, but I hate to take away from Mr. Butler
25 or Mr. Wasserman. You know, you made them a proposal. So

1 why don't we just take this as you're giving me notice of
2 what you are talking about, and why don't you all talk about
3 it.

4 MR. ROZENDAAL: Understood. Thank you, your
5 Honor.

6 MR. GARR: Just in the interests of disclosure,
7 we have not talked about this with the other side, but there
8 is a licensing issue with Samsung Display as well, so I
9 think we'll participate in those conversations.

10 THE COURT: All right. Why don't you all
11 participate in the conversation and I expect you'll reach
12 some reasonable result. So thank you, Mr. Rozendaal.

13 Is there anything else anybody wants to bring
14 up? Okay.

15 Well, nice to see you. And so the transcript
16 will serve as the order of the Court if it should be needed,
17 although I don't think it will be. Okay.

18 (Counsel respond, "Thank you, your Honor.")

19 (Conference concluded at 1:58 p.m.)

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